Supreme Court, U.S.
FILED

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IN THE U.S. SUPREME COURT

OCTOBER TERM, 1998

Arthur Duran,

Plaintiff-Petitioner,

v.

CNO, Inc.

Defendant-Respondent.

On petition for writ of certiorari to the

New Mexico Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Counsel of Record
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A.) Question presented for review

Does constitutional procedural due process limit a Court of Appeal's discretion to decide a factual issue raised for the first time on appeal?

B.) List of parties to the proceeding

The party to the proceeding in the Court whose judgment is sought to be reviewed is CNO, Inc. The parties to the original proceeding are as follows: Dos Griegos Corporation; Dos Griegos Limited Partnership; Dean Carris, individually and as general partner of Dos Griegos Limited Partnership; CNO, Inc.; the Town of Silver City; Copper Acres, Inc.; Anchor Ranch Land Company; Dan and Rebekah Coleman; Matt and Jamie Whetsell; Robert and Sabra Humphrey; Silver Savings and Loan Association; Federal Deposit Insurance Corporation/Resolution Trust Company as receiver for Silver Savings and Loan Association; Frank Quarrell; and all other unknown claimants of interest in the premises adverse to the Plaintiff.

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New Mexico Supreme Court Rules
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Robert Martineau, Considering New Issues on Appeal: the General Rule and the Gorilla Rule, 40 Vand.L.Rev. 1023 (Oct. 1987).....15

Thomas Marvell, Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar, 75 Judicature 86 (Aug/Sept. 1991).....18

D.) Citations to Official and Unofficial reports

The reports in this case are unpublished.

E.) Jurisdiction

The Memorandum Opinion of the New Mexico Court of Appeals sought to be

reviewed was entered June 15, 1998. Rehearing was denied by the New Mexico Court of Appeals on July 24, 1998. Certiorari to the New Mexico Court of Appeals was denied by the New Mexico Supreme Court on September 8, 1998. Jurisdiction is proper under 28 U.S.C. §1257(a) in reviewing a question of rights arising under the U.S. Constitution after final review has been denied in a state court of last resort, and final judgment has been had in that state's Court of Appeals.

F.) Provisions of Constitutional and Statutory Law Involved in this Case

"Nor shall any person...be deprived of life, liberty, or property, without due process of law..." U.S.Const. amend. V

"...Nor shall any State deprive any

person of life, liberty, or property, without due process of law..." U.S. Const. amend XIV, § 1.

New Mexico Supreme Court Rules Annotated, New Mexico Rules of Appellate Procedure, Rule 12-210(D)(Summary Calendar)(Reproduced as Appendix 5)

G.) Concise statement of the case

1.) The sufficiency of Plaintiff's title was raised for the first time on appeal.

Defendant CNO, Inc. ("Defendant"), filed a motion to dismiss. After argument, the Court granted the motion to dismiss. (The order is reproduced as Appendix 2.) Plaintiff appealed to the New Mexico Court of Appeals from this order.

The issue of whether Plaintiff had

title sufficient to support a claim of slander of title was raised for the first time on appeal by Defendant in response to the first Calendar notice. Defendant stated in "Defendant/Appellee's Memorandum in Response to Calendar Notice (with updated page references to the Record Proper)", at p.7:

> "Until reformation of his deed was decreed 1/6/98, Duran did not have title to the disputed boundary strip. Such inchoate title can not be slandered. *Bynum v. Bynum*, 87 NM 195, 199,531 P.2d 618 (Ct.App. 1975)(cert. denied); Cf., *Lopez v. Adams*, 116 NM 757, 759, 867 P.2d 427 (Ct.App.1993)(cert. denied)."

The Court of Appeals incorporated this argument into its Second Calendar Notice, at p.2:

> "This recording [of CNO's deed] occurred more than four years prior to the judgment that reformed Plaintiff's deed awarding him title to the disputed area. Thus, until that judgment, Plaintiff did not have title to the disputed boundary strip."

While Plaintiff responded to this in a document entitled "Plaintiff-Appellant's Memorandum in Response to Second Calendar Notice", Plaintiff was not given an opportunity to introduce any evidence to prove his title to this land prior to the judgment that reformed his deed.

2.) How the issue was raised and preserved

The Plaintiff raised the issue that the question of whether Plaintiff had sufficient title was a new issue first raised by the Defendant on appeal. Plaintiff stated on page 3 of Plaintiff-Appellant's Memorandum in Response to Second Calendar Notice:

> "Further, this argument was made by Defendant-Appellee for the first time on appeal, and Plaintiff-Appellant objects to it on this ground as well."

The New Mexico Court of Appeals responded in its Memorandum Opinion:

> "Plaintiff argues that this is a new argument which was not made below. The motion below was a motion to dismiss for failure to state a claim for slander of title. Slander of title requires Plaintiff to have good title before he can claim that another slandered it. It was established that Plaintiff did not have good title until his deed was reformed. Thus, his claim against this defendant must fail. Regardless of the argument made below, the trial court properly dismissed the claim against this Defendant for failure of Plaintiff to state a claim. See Westland Dec. Co., Inc. v. Romero, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App. 1994)(an appellate court will affirm a lower court's ruling if right for any reason)."

The precise issue of procedural due process was then raised in the Brief in Support of Plaintiff-Appellant's Motion for Rehearing and Reconsideration by arguing this issue. The pertinent portions are set forth in Appendix 6. The Motion for Rehearing was denied without

opinion.

The issue of procedural due process was again raised and argued in Plaintiff's Petition for Writ of Certiorari filed in the New Mexico Supreme Court. The Petition for Writ of Certiorari was denied by the New Mexico Supreme Court without opinion.

H.) Reasons for Granting the Petition for Writ of Certiorari

Certiorari should be granted to clarify the precise meaning of procedural due process in the context of factual issues raised for the first time during a summary appellate review. To decide this issue would resolve an inherent conflict between the cases of Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941) and Singleton v. Wulff, 428 U.S.

106, 120-121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Certiorari should also be granted to correct the lurking wide-spread violations of Due Process rights by Courts of Appeals as a result of deciding factual issues for the first time on appeal without providing a meaningful opportunity to present evidence.

The U.S. Supreme Court in Hormel, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 stated:

> "For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

See also Singleton v. Wulff, 428 U.S. 106,

120-121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)(Where only issue was one of standing on motion to dismiss, Appellate Court should not have considered additional issues of fact.)

Singleton, supra, however, contains the statement:

> "The matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals, to be exercised on the facts of individual cases. We announce no general rule."

This statement has caused one commentator to remark that the general rule set out in Hormel, supra,

> "is no longer a general rule... [t]he current situtation is destructive of the adversary system, causes substantial harm to the interests that the general rule is designed to protect, and is an open invitation to the appellate judges to 'do justice' on ad hoc rather than principled bases."

Robert Martineau, Considering New Issues

on Appeal: the General Rule and the Gorilla Rule, 40 Vand. L. Rev. 1023, 1058-1061 (Oct. 1987). Plaintiff maintains that the rule set forth in Hormel, supra, places procedural due process limitations on the Appellate Court's discretion. See U.S.Const. amend. V, and XIV, § 1.

The meaning of procedural due process is clear. The U.S. Supreme Court stated in Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972): "[f]or more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"

In this case, there was a lack of notice at the trial court level that the sufficiency of Plaintiff's title was in

dispute. See In re Gault, 387 U.S. 1, 33-34, 87 S.Ct. 1428, 1446-1447, 18 L.Ed.2d 527 (1967)(Notice must include disclosure of "the specific issues...[the party] must meet.")

The issue of the sufficiency of Plaintiff's title was raised by the Defendants for the first time on appeal in response to a calendar notice while the appeal was on the summary calendar. The summary calendar system provides no procedure to receive evidence, and grants the litigants no opportunity to introduce evidence. See New Mexico Supreme Court Rules Annotated, New Mexico Rules of Appellate Procedure, Rule 12-210(D).

The Plaintiff has suffered the exact harm the Court articulated in Hormel, supra--a final decision on issues upon which the parties have had no opportunity

to introduce evidence.

"The New Mexico Court of Appeals, using a summary calendar decides two-thirds of its appeals in an average of less than 100 days by doing away with transcripts, briefs and oral arguments." Thomas Marvell, Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar, 75 Judicature 86 (Aug/Sept. 1991). With this wide-spread practice comes the danger of wide-spread deprivations of procedural due process. If the New Mexico Court of Appeals begins its summary review with the premise that the trial court's decision will be affirmed if it is right for any reason, and then proceeds to raise and determine new factual issues upon which the parties have had no opportunity to present any evidence as reasons for affirmance, wide-spread

violations of procedural due process are inevitable.

WHEREFORE Plaintiff-Petitioner prays that the U.S. Supreme Court issue a writ of certiorari to the New Mexico Court of Appeals, to review the issue of procedural due process raised herein. Plaintiff-Petitioner further prays that the decision of the New Mexico Court of Appeals be reversed, and remanded to the trial court, and for an injunction tailored to prevent future violations of procedural due process by the New Mexico Court of Appeals.

Very respectfully submitted,

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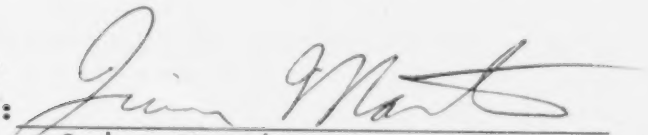
By: 
Quinn Martin

Dated: December 3, 1998

Appendix 1: Memorandum Opinion of the New Mexico Court of Appeals

[File Stamp]
Court of Appeals of New Mexico
Filed
Jun 15 1998
/s/Patricia R. Wallace

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ARTHUR DURAN,

Plaintiff-Appellant,

vs. **No. 19,141**

CNO, INC.,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
Gary Jeffreys, District Judge

HARRY SNOW
Silver City, New Mexico

Attorney for Appellant

DONALD C. TURPEN
Silver City, New Mexico

PHILIP C. SNYDER
Campbell & Snyder, LLP
Albuquerque, New Mexico

Attorneys for Appellees

MEMORANDUM OPINION

ALARID, Judge.

Plaintiff appeals the dismissal of his claim for slander of title against Defendant, CNO. In our second calendar notice, we proposed to affirm the dismissal on the basis that a disputed boundary did not give Plaintiff adequate title to claim slander. Plaintiff has timely responded. Not persuaded by his arguments, we affirm.

In our second calendar notice, we noted that CNO's publication of matters alleged to be untrue and disparaging of Plaintiff's property right was the recording of a deed with a boundary overlapping Plaintiff's property. We noted that this created a dispute regarding ownership of that particular

strip of land. Until that ownership dispute was resolved, Plaintiff did not have title to the boundary strip. Thus, he could not claim a slander of that title. See Lopez v. Adams, 116 N.M. 757, 759, 867 P.2d 427, 429 (Ct. App. 1993) (no claim for slander of title when title could not be ascertained until judgment).

Plaintiff argues that he is claiming a slander of title with regard to two tracts of land and that the disputed boundary only affected one tract. He then asserts that even if he did not have good title to one tract, the other tract was still slandered. It appears, however, that the overlap of deed description affected both tracts. Thus, Plaintiff lacked good title to both tracts and the prior law suit that settled the boundary resolved the dispute with regard to both

tracts. We are unconvinced by Plaintiff's claim that the boundary dispute only applied to one tract and that he held good title to the second tract, allowing his claim for slander of title to that tract to remain. The record does not support his assertion.

Plaintiff argues that this is a new argument that was not made below. The motion below was a motion to dismiss for failure to state a claim for slander of title. Slander of title requires Plaintiff to have good title before he can claim that another slandered it. It was established that Plaintiff did not have good title until his deed was reformed. Thus, his claim against this Defendant must fail. Regardless of the argument made below, the trial court properly dismissed the claim against this Defendant

for failure of Plaintiff to state a claim. See Westland Dev. Co., Inc. v. Romero, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App. 1994) (an appellate court will affirm a lower court's ruling if right for any reason).

Plaintiff also argues that summary judgment was inappropriate in this case because discovery was still proceeding and he was not given notice that this was a summary judgment. He contends that it is not clear that the trial court considered matters outside the pleadings. The trial court's own order shows that it considered matters outside the pleadings. We believe the trial court properly did so upon an allegation that under no version of facts could Plaintiff allege a claim of slander of title against this Defendant.

Because the trial court properly

dismissed the claim for slander of title against this Defendant, we do not discuss res judicata.

For the reasons stated here, we affirm.

IT IS SO ORDERED.

_[signature]_____

A. JOSEPH ALARID, Judge
WE CONCUR:

___[signature]_____
RUDY S. APODACA, Judge

____[signature]_____
BENNY E. FLORES, Judge

Appendix 2: New Mexico Trial Court's Order on CNO, Inc.'s Motion to Dismiss

[file stamp]
FILED IN OPEN COURT
Date 12/16/97
/s/Gary Jeffreys
District Judge

SIXTH JUDICIAL DISTRICT COURT
COUNTY OF GRANT
STATE OF NEW MEXICO

ARTHUR DURAN,)
)
Plaintiff,)
)
vs.)
)
DOS GRIEGOS CORPORATION, et al.,)
)
Defendants.)

No. CV 97-128

ORDER

CNO, Inc.'s Motion to Dismiss and for sanctions came on to be heard before the Court on October 15, 1997. The Court heard the arguments of counsel, examined the documents submitted and took the

matter under advisement. The Court now finds that the Motion to Dismiss should be granted [sic]

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion seeking dismissal of CNO, Inc. from these proceedings is granted and CNO, Inc. is dismissed.

____[signed Gary Jeffreys}_____
District Judge

Submitted by:

REYNOLDS' LAW FIRM, P.C.

By_[signature]_____
John W. Reynolds
Attorneys for CNO, Inc.

APPROVED:

CAMPBELL & SNYDER LLP

By__telephonically 12/15/97_____
Philip Craig Snyder
Attorneys for Dos Griegos and Dean Carris

APPROVED AS TO FORM:

HAN AND SNOW

By approved by fax 12/15/97
Harry Snow
Attorneys for Plaintiff

Appendix 3: Order of New Mexico Supreme Court denying petition for writ of certiorari

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Tuesday, September 8, 1998

No. 25,317

ARTHUR DURAN,

Plaintiff-Petitioner,

vs.

CNO, INC.,

Defendant-Respondent.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied**

in Court of Appeals number **19141.**

ATTEST: A True Copy

[seal]

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By___[signed Jane Gerrule]__
Chief Deputy

Appendix 4: Order of New Mexico Court of Appeals Denying Plaintiff's Motion for Rehearing

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COURT OF APPEALS
STATE OF NEW MEXICO
P.R.WALLACE, CLERK

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ARTHUR DURAN,

Plaintiff-Appellant,

vs. **No. 19,141**

CNO, INC.,

Defendant-Appellee.

A.JOESPH ALARID
Presiding Judge
RUDY S. APODACA
Judge
BENNY E. FLORES
Judge

---/

ORDER ON MOTION FOR REHEARING

In this cause, a motion for rehearing

having been filed by Plaintiff-Appellant, and consideration having been had by all of the panel members of the original panel,

IT IS ORDERED that the motion for rehearing is hereby **DENIED.**

___[Signature]_____
Presiding Judge

Appendix 5: New Mexico Supreme Court Rules Annotated, Rules of Appellate Procedure, Rule 12-210(D)

D. **Summary calendar.** If the case is placed on the summary calendar:

(1) a transcript of proceedings shall not be filed;

(2) the appellate court clerk's notice shall state the basis for proposed disposition;

(3) appellate counsel or trial counsel shall have twenty (20) days from date of service of the appellate court clerk's notice of proposed disposition to file a memorandum setting forth reasons why the proposed disposition should or should not be made and why the case should or should not be assigned to the summary calendar, but the party shall be

restricted to arguing only issues contained in the docketing statement. The docketing statement may be amended at this time for good cause shown with the permission of the appellate court;

(4) no oral argument shall be allowed concerning the proposed disposition; and

(5) if there is no summary disposition, the case will be reassigned to the appropriate calendar.

Appendix 6: Excerpt from Plaintiff's Brief in Support of Plaintiff-Appellant's Motion for Rehearing and Reconsideration

C. The Court denied Plaintiff due process.

The Court denied Plaintiff due process by allowing the issue of whether the basis of Plaintiff's claim of title was sufficient to support a claim for slander of title, to be raised for the first time on appeal.

Due process is protected by the New Mexico and United States Constitutions. N.M. Const. Art. II Sec. 18 ("No person shall be deprived of life, liberty or property without due process of law."); U.S.Const. Amd. 5,14 ("nor be deprived of life, liberty or property without due process of law")("Nor shall any state

deprive any person of life, liberty or property without due process of law.")("; See also N.M. Const. Art II Sec. 1 ("...the Constitution of the United States is the supreme law of the land."); U.S. Const. Art VI ("This constitution...shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.")

Procedural due process is the fundamental component of justice and liberty: "'the essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty.'" In re Miller, 88 N.M. 492, 497-98, 542 P.2d 1182, 1187-1188 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975), quotation from Mid-

Plains Telephone, Inc. v. Public Service Com'n, 202 N.W.2d 907, 911 (Wis. 1973). The New Mexico Court of Appeals stated in Miller, 88 N.M. at 497-98, that

> The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings. By "procedural due process" we mean the following:
>
> > Procedural due process, that is, the element of the due process provision of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty or property may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing)....
>
> Embodied in the term "procedural due process", is the opportunity to be heard and present any defense.

Due process guarantees a party the right to be informed of any claim against him or argument he must meet, and that he will have his chance to present his side

of the case. In re Downs, 82 N.M. 319, 320, 481 P.2d 107, 108 (1971) (Due process "...also insures that he will be informed of any claim against him and will have a chance to present his side of the case.")

In this case, Plaintiff had no notice that summary judgment would be taken against him on the ground that the basis of his claim of title was insufficient to support a claim for slander of title. And, since Plaintiff had no notice, he did not have a meaningful opportunity to develop a factual record which would support his claim that the basis of his claim of title was sufficient to support a claim of slander of title. The two most important ingredients of procedural due process, notice of the claims against him and an opportunity to present evidence and

be heard, were absent in this case. See McCoy v. New Mexico Real Estate Comm'n, 94 N.M. 602,604, 614 P.2d 14, 16 (1980)("Embodied in the term 'procedural due process' is reasonable notice and opportunity to be heard and present any claim or defense")

The granting of summary judgment under these circumstances violated Plaintiff's rights to due process, and deprived him of his right to have his case heard by a jury of his peers.